

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

D.H., a minor, by his guardian ad litem
A.H., et al.,

Plaintiffs,

vs.

NOBEL LEARNING COMMUNITIES,
INC., et al.,

Defendants.

CASE NO. 15cv460-LAB (KSC)

**ORDER DENYING MOTION FOR
ATTORNEY'S FEES**

This action, originally filed in state court, concerned Defendants' disenrollment of a student diagnosed with Attention Deficit Hyperactivity Disorder, and sought the student's reinstatement as soon as possible. On the eve of a scheduled hearing in state court, Defendants removed this action. Plaintiffs quickly filed a motion to expedite their hearing for a temporary restraining order, arguing that the student should be allowed to finish the eighth grade, and pointing out that the school year ended on June 10, 2015, so time was of the essence.

Because it appeared the Court lacked jurisdiction, it issued an order to show cause. Plaintiffs then moved for remand, emphasizing again that time was of the essence. They also requested for an award of attorney's fees, for improper removal. Defendants responded by arguing that the Court could exercise both federal question and diversity jurisdiction. The fee request argues that Defendants removed for the improper purpose of delaying a hearing scheduled before the state court.

1 The Court on March 17 remanded the case, but retained jurisdiction over the fee
2 request (Docket no. 8) and ordered Defendants to respond. The issue is now fully briefed
3 and ready for decision.

4 **Legal Standards**

5 Unwarranted removals cause needless delays, impose costs on opposing parties, and
6 waste judicial resources. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). A
7 district court may, in its discretion, “require payment of just costs and any actual expenses,
8 including attorney fees, incurred as a result of [improper] removal.”• 28 U.S.C. § 1447(c).
9 “Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only
10 where the removing party lacked an objectively reasonable basis for seeking removal.”
11 *Martin*, 546 U.S. at 141.

12 The fact that an argument does not prevail does not mean it is objectively
13 unreasonable; “removal is not objectively unreasonable solely because the removing party's
14 arguments lack merit, or else attorney's fees would always be awarded whenever remand
15 is granted.” *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008). Where
16 precedent clearly forecloses the basis for removal, removal is objectively unreasonable. *Id.*
17 at 1066 (citing *Lott v. Pfizer, Inc.*, 492 F.3d 789 (7th Cir. 2007)). But where the law was not
18 so clear as to be beyond reasonable debate, removal is not objectively unreasonable. *Id.*
19 (citing with approval *Lott*'s analogy to qualified immunity analysis).

20 **Discussion**

21 In opposition to the fee motion, Defendants argue that federal question did exist. But
22 for reasons explained in the remand order, it clearly did not. This was an ordinary contract
23 dispute, and state law created all of Plaintiffs' rights of actions. The fact that the contract
24 had some relationship to federal law was of no import. This is well established law, and the
25 Court's order cited multiple cases supporting its determination. If this were the only basis
26 for removal, a fee award would be appropriate.

27 Diversity was a much closer call. There was no dispute the parties were diverse; the
28 only question was whether the amount in controversy was met. The complaint sought

1 around \$31,500 in damages, but included requests for other damages and relief.
2 Defendants, relying on verdicts and awards in other cases, arrived at what they considered
3 a conservative estimate of the value of the other relief sought, which they said pushed the
4 value of the case to \$76,500.

5 The Court reviewed the awards Defendants relied on, and found the cases not
6 analogous, and Defendants' estimates too speculative. By a preponderance of the
7 evidence, the Court therefore determined Defendants had failed to meet their burden of
8 showing that the amount in controversy exceeded \$75,000.

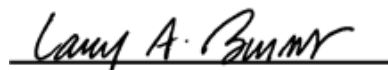
9 While the Court disagreed with Defendants' analysis, the basis on which they argued
10 for a higher amount in controversy was not so clearly wrong as to be objectively
11 unreasonable. See *Lussier*, 518 F.3d at 1066. In particular, the likely amount of an
12 emotional damages award was inherently nebulous, since such damages are frequently
13 difficult to predict, and closely analogous cases are often difficult to find. See *Brantley v.*
14 *Boyd*, 2013 WL 3766911 (N.D. Cal., July 16, 2013) (noting the "difficulty of ascertaining
15 damages resulting from emotional distress, in part, due to its subjective nature and the
16 uniqueness of each claim"). While the Court found by a preponderance that the amount in
17 controversy was not met, there was still some evidence to support Defendants' position.

18 **Conclusion and Order**

19 A fee award is discretionary, and should serve the ends of justice. *Martin*, 546 U.S.
20 at 139. While the timing of the removal gives reason to suspect Defendants' motives and
21 there was clearly no federal question jurisdiction, the Court finds the removal on the basis
22 of diversity was not objectively unreasonable. The Court exercises its discretion in this case
23 not to award fees, and the fee request (Docket no. 8) is **DENIED**. This order disposes of all
24 pending issues, and the Clerk shall close the docket.

25 **IT IS SO ORDERED.**

26 DATED: December 16, 2015

27 

28 **HONORABLE LARRY ALAN BURNS**
United States District Judge